No. 390. 136

Brief of Miller for Petitioner. 390

Office Supreme Court U.S.
FILED
AUG 16 1900
JAMES H. MCKENNEY
Clerk.

Filed Aug. 16, 1900.

IN THE

Supreme Court of the United States.

WILLIAM B. DINSMORE, et al,
Appellants.

vs.

THE RAILROAD COMMISSIONERS OF THE STATE OF GEORGIA, et al,
Appellees.

WILLIAM B. DINSMORE, et al.,
Appellants.

vs.

THE SOUTHERN EXPRESS CO., et al.,
Appellees.

Petition for Writ of Certierari.

FRANK H. MILLER, Attorney for Appellants,
705 Broad Street, Augusta, Georgia.

To the Railroad Commissioners of the State of Georgia, and to the Honorable Joseph M. Terrell, Attorney-General of the State of Georgia and Solicitor of the said Commissioners.

Also, to the Southern Express Company.

PLEASE TAKE NOTICE.

That on Monday, October 15, 1900, at the opening of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, a petition will be presented to the Court by William B. Dinsmore and others, and application made for the issuing of the writ of certiorari to be directed to the Circuit Court of Appeals of the United States for the Fifth Circuit, to bring up for the review and determination of the Supreme Court of the United States and for such other proceedings as shall seem best to that Court, a transcript of the record including the decision of the said Circuit Court of Appeals rendered June 1st, 1900, in the case of L. N. Trammell, et al., against William B. Dinsmore, et al., and the cross appeal of William B. Dinsmore, et al., against the Southern Express Company, being No. 820 on the docket of the said Fifth Circuit Court of Appeals.

(Signed.) FRANK H. MILLER,
Solicitor for W. B. Dinsmore, et al.

Service of the above notice is hereby acknowledged and copy received this day by me as Attorney-General of the State of Georgia and Solicitor for the Railroad Commissioners thereof.

JOSEPH M. TERRELL,
August 4, 1900. Attorney-General and Solicitor.

Service of the above notice is hereby acknowledged and copy received by the Southern Express Company.

F. G. DUBIGNON,
August 7, 1900 General Counsel So. Ex. Co.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

Ex Parte
WILLIAM B. DINSMORE, ET AL.,
PETITIONERS.

Petition for writ of certiorari, requiring the Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court for its review and determination, the case of the Railroad Commission of Georgia vs. W. B. Dinsmore, et al., being No. 820 in that Court, wherein the said Railroad Commission were the appellants, and your petitioners, W. B. Dinsmore, et al., respondents.

To the Honorable the Supreme Court of the United States:

The petition of William B. Dinsmore and C. Gray Dinsmore, and said William B. Dinsmore and C. Gray Dinsmore and Dumont Clark, as executors and trustees under the will of William B. Dinsmore, deceased, respectfully show to this honorable Court as follows:

1. Your petitioners are citizens of the State of New York, resident in the city of New York, and are stockholders in the Southern Express Company, a corporation created by and existing under the laws of the State of Georgia, having its principal place of business in the city of Augusta, Ga., in the northeastern division of the Southern District of Georgia, your petitioner, William B. Dinsmore, being the owner of 100 shares of said stock, and your petitioners, trustees and executors of the estate of William B. Dinsmore, owning 800 shares of said stock, of the par value of $50,000 or other large sum, while the aggregate number of the shares of said company outstanding amount to 50,000, and are divided among a large number of persons.

2. That the said Southern Express Company does a regular express business as a common carrier—to carry small packages quickly from place to place throughout the Southern States, and within the limits of the State of Georgia, was so engaged on the 13th day of June, 1898, and is now so engaged.

3. That on the 13th day of June, 1898, the Congress of the United States passed an act entitled "An act to provide ways and means to meet

war expenditures and for other purposes," section six of which act required that on and after the •

"first day of July, eighteen hundred and ninety-eight, there shall "be levied, collected, and paid, for and in respect of the several "bonds, debentures, or certificates of stock, and of indebtedness and "other documents, instruments, matters, and things mentioned "and described in Schedule A of this act, or for and in respect of "the vellum, parchment, or paper upon which such instruments, "matters, or things, or any of them, shall be written or printed by "any person or persons or party *who shall make, sign, or issue the "same*, OR *for whose use or benefit* the same shall be made, signed, "or issued, the several taxes or sums of money set down in figures "against the same, respectively, or otherwise specified or set forth "in the said schedule."

And in Schedule A, attached to the twenty-fifth section of said act, appears the language, as follows:

"Express and freight.—It shall be the duty of every railroad and "steamboat company, carrier, express company, or corporation, or "person whose occupation is to act as such, to issue to the shipper "or consignor, or his agent, or the person from whom any goods "are accepted for transportation a bill of lading, manifest, or other "evidence of receipt and forwarding for each shipment received for "carriage and transportation, whether in bulk or in boxes, bales, "packages, bundles, or not so enclosed or included; and there shall "be duly attached and cancelled as in this act provided to each of "such bills of lading, manifests, or other memorandum, and to each "duplicate thereof, a stamp of the value of one cent. Any failure "to issue such bill of lading, manifest, or other memorandum as "therein provided shall subject such railroad or steamboat com-"pany, carrier, express company, or corporation or person to a pen-"alty of fifty dollars for each offense, and no such bill of lading, "manifest, or other memorandum shall be used in evidence unless "it shall be duly stamped as aforesaid."

That the penalty prescribed by the said act of Congress, section 7, for the issuance of a paper without being duly stamped is indictment as for misdemeanor and, upon conviction, payment of a fine of not more than $100, in the discretion of the Court, and such instrument, document, or paper shall not be competent evidence in any Court.

4. That after the approval of the said act of Congress, June 13, 1898, and when it became operative, the said Southern Express Company asked and demanded the production by its customers of the stamp required to be attached under the provisions of the said act at the issuing of its receipts or bills of lading, said express company insisting that it should not carry any package or issue its receipt therefor until the sender or shipper furnished the necessary governmental stamp therefor, as required by said act.

5. That certain citizens of Georgia refused to furnish the stamps to be attached to the receipts or bills of lading or to pay for the same if furnished by the express company, and thereupon complained to the railroad commissioners of the State of Georgia, to wit: Trammel, Crenshaw, and Atkinson, who, on July 11, 1898, issued an order, as follows:

"It being represented to the railroad commission of Georgia "that the Southern Express Company, a corporation engaged as an "express company within this State in the business of a common "carrier of goods and merchandise for hire, since the passage by "the Federal Congress of an act, approved June 13, 1898, entitled "'An act to provide ways and means to meet war expenditures, "'and for other purposes,' has exacted and continues to exact from "shippers as a condition precedent to forwarding any goods ten- "dered to it for transportation between points within this State "the payment of a special tax upon such shipments imposed by "said act, thus indirectly increasing the cost of transportation "beyond the rate fixed therefor by this commission, it is—

"Ordered that the Southern Express Company do appear before "this commission on the 18th day of July, 1898, then and there "to show cause, if any it can, why it should not be held to have "violated the rules and regulations of this commission by the ex- "actions or over-charges, as a foresaid, and why suit should not be "instituted against it in every case of such overcharges for the "recovery of the penalty provided by law for such illegal act."

Cause was shown respectfully denying all jurisdiction in the premises on the part of the said commission, who, on August 2, 1898, ordered and directed the said stamp tax to be furnished, attached, cancelled, and paid by the said Southern Express Company alone, and not by the shippers, in whole or in part.

6. That by paragraph 1, section 2, article IV, of the constitution of Georgia, of December 21, 1877, section 5797 of the Civil Code, it is ordained that the power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariff, were thereby conferred upon the General Assembly, whose duty it shall be to pass laws, from time to time, to regulate freight and passenger tariffs, to prohibit unjust discriminations on the various railroads of the State, and prohibit said roads from charging other than just and reasonable rates, and enforce the same by adequate penalties; that, acting under this constitutional provision, the General Assembly of the State of Georgia passed an act October 14, 1879, to carry the same into effect, which was enlarged by the acts of December 18, 1890, October 16, 1891, August 31, 1891, and October 17, 1891, which said acts now comprise sections 2185 to 2217 of the Civil Code of the State of Georgia, to which express reference is hereby made as if set out herein; that by another act, approved October 21, 1891, the General Assembly passed an act extending the powers of the railroad commissioners so as to give them power and authority to *regulate charges for express companies for transportation*, and

to apply the powers given the said commissioners by law over railroad companies to all companies or persons owning, controlling, or operating a line or lines of express, and to make the penalties prescribed against railroads for violating the commissioners' rules apply to the companies or persons therein named, whose line or lines is or are wholly or in part in the State, and for other purposes, the enacting part of which act is now section 2217 of the Civil Code of Georgia; that section 2 of the said act, which is now 2218 of the Civil Code of Georgia, enacts that the powers of the commissioners to regulate charges for corporations, companies, and persons herein referred to shall apply only to charges by express for the transportation from one point to another in the State of Georgia.

7. That, pursuant to the authority delegated to them, the railroad commissioners of Georgia fixed and prescribed rules, tariffs, and classifications governing express companies plying between points within the State of Georgia and submitted the same from time to time to the executive of the said State. To these, as they last appeared in the twenty-fifth report, submitted October 15, 1897, and published and distributed throughout the State, petitioners referred, praying to be excused from annexing a copy on account of the voluminous character and details thereof.

8. That the said Southern Express Company, from the date of the passage of the said legislative act, October 21, 1891, conformed to the rules, orders, and tariffs so adopted by the railroad commission of Georgia, and were continuing to do so when the said act of Congress of June 13, 1898, became operative; that the penalty fixed by the said legislative acts of the State of Georgia for violating any order or rule or regulation of the railroad commission of the State of Georgia is not less than one thousand dollars ($1,000) nor more than five thousand dollars ($5,000) for each offense, to be fixed by the presiding judge in a suit where action is brought against the company, which suits are to be brought by the attorney-general of the State when directed by the said railroad commission.

9. That petitioners were informed and believed that the tax imposed by the said war revenue law of 1898, as required by the said order of the said railroad commission, would aggregate to the Southern Express Company in the State of Georgia, annually, the sum of forty-two thousand dollars ($42,000) or other large sum, and petitioners avered that the said railroad commission were without any authority under the constitution and the legislative acts of the State of Georgia or under the said act of Congress approved June 13, 1898, to require the payment of the said stamp tax by said company, upon and before issuing its receipts and bills of lading; petitioners averring, also, that the express company has to make its own arrangements with the railroads for the carrying of its freight on passenger trains; that the

railroads cannot be compelled to do this for the express company, and there is no prescribed limit to their charges against the Southern Express Company, as they are not charges made against the public; that the contracts of the express company with the railroad companies are matters of negotiation, and the average charge of the railroads is 50 per cent. of the express company's gross receipts; that it costs the express company 43 per cent. of its receipts to do its business, and this, added to the average 50 per cent. which must be paid to the railroads, makes the total cost to the express company 93 per cent. of its receipts. A considerable express business is done at a charge of 10 cents per package, and a very large proportion of its intrastate business is done at a charge of 25 cents per package. Take 93 per cent. from these charges and there is left a margin of seven-tenths of a cent on the 10-cent packages and one three-quarters of a cent on the 25-cent packages. If the express company is compelled to pay one cent each on the receipts, it loses three-tenths of a cent on every 10-cent package and makes only three-quarters of a cent on the 25-cent packages. This would materially reduce the very moderate profit of the business, and will so reduce the income of the company as to lessen any dividends payable to its shareholders, like petitioners. That under section nine of the act of the General Assembly of the State of Georgia, approved December 24, 1896, Public Laws 28—to levy and collect a tax for the support of the State government for the years 1897 and 1898—all persons or companies doing an express business and charging the public therefor in the State of Georgia were required to "pay 2½ per centum on their gross receipts," and all persons or the superintendent or general agent of each express company were required to make a quarterly return under oath, in the form therein prescribed, under a penalty of indictment, conviction, and punishment, pursuant to section 1039 of volume III of the Code of 1895, and a failure to pay the tax will subject such corporation to a forfeiture of its charter; that under the provisions of this act, in the imposition of this tax and the enforcement thereof, no deduction will be allowed for the expense the company is subjected to in complying with the said order of the railroad commission and in making payment itself of the stamp tax imposed by the said revenue act of Congress. In other words, the corporation will be paying a tax to the State upon the entire aggregate sum paid out for stamps, as required by the order of the railroad commission, which payment will come out of the gross income of the company.

10 That petitioners avered that there is no reason to believe that there can be and will be an increase in the local and other State business of said company; that the cost of conducting said business has been fixed by years of experience, and the amounts now paid therefor are the lowest that can be obtained and adopted and by which the public can be satisfactorily served by said express company; that the charges fixed by said commissioners before the passage of the said revenue law were established so as to enable the company to live, operate, and pay a fair dividend or return to its owners for the money and property embarked

in the said business, and that the order of the said commissioners, requiring the payment by the said company of the said one cent stamp on all bills of lading and receipts that it issued for the business done was resolved upon by said commissioners illegally and arbitrarily, and will cause a large reduction in the income of the company; that the enforcement of this order will be unfair, unjust, and unreasonable; that the rates of carriage now imposed require the said express company to carry many classes of freight at barely cost, and the expense incident to said service will in future be materially increased by the stamp aforesaid; that the payments for said stamps thus required to be made as a part of the rates imposed on the express company, and under which it must do business, by the order of said commission, will result in irreparable damage and injury and will cause a diminution of income, as nearly as can be ascertained, of forty thousand dollars ($40,000) per annum and a loss to petitioners in a decreased value of their shares of ten thousand dollars or other large sum.

10. That petitioners were informed and verily believed that, in compliance with the requirements of the orders of the railroad commission of Georgia, as aforesaid, the said The Southern Express Company and its directors had avowed their intention and purpose to comply therewith and take no steps whatsoever to resist the enforcement of the order of the said commissioners for fear of the penalties which may be assessed against them in the event of their non-compliance with the order of the commission.

11. That petitioners duly requested the directors of the express company not to comply with the said order, and on their subsequent refusal of this request petitioners, on the 27th day of October, 1898, filed their bill in the Circuit Court of the United States for the southern district of Georgia, as against the said Southern Express Company and Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, individually and constituting the railroad commissioners of Georgia, and Joseph M. Terrell individually and as attorney-general of the State of Georgia, whereby petitioners, after reciting the foregoing facts, prayed that the order of the railroad commission of August 2, 1898, requiring the said Southern Express Company to pay the amount of the war revenue tax on business from one point to another in the State of Georgia, without endeavoring to collect the same from shippers, and requiring said company to make the payment thereof before the issuing of express receipts or bills of lading, be decreed to be without jurisdiction on the part of said commission, unconstitutional, null and void, and also that the Southern Express Company should be restrained from complying with said order and paying said war revenue tax and the attorney-general from instituting penalty suits against the express company for the purpose of enforcing the order of the railroad commission and a writ of injunction be granted to complainants.

12. That in reply to this bill the defendants duly entered their appear-

ance, and the railroad commission of Georgia and the attorney-general filed a demurrer thereto upon the following grounds: Because the complainants are not entitled to the relief prayed for and there is no equity in the bill, and for special cause of demurrer that there was a complete and adequate remedy at law; because the court had no jurisdiction to grant the relief prayed for; because the superior courts of the State of Georgia had exclusive jurisdiction of the questions involved, and that the suit was in effect one against the State.

13. That when the application for injunction was argued before his honor, Judge Emory Speer, in said Circuit Court, complainants insisted that as against said commission the construction of the revenue law was not necessarily involved, "as the commission had no power to administer it." Yet, "if in the opinion of the court a construction of the law was involved," a view contrary to that of the commission was submitted, viz: that the stamp duty was to be paid by the person "for whose use or benefit" the express receipt was issued; that this was the shipper, as he needed the receipt for his protection against the carrier—it having his property in its possession to transport by express. The Court, after consideration of the argument, rendered a decision March 7, 1899, adjudging that the prayer that the Southern Express Company be enjoined from voluntarily paying the war stamp tax in question be denied, and further, that the railroad commission be enjoined from taking any steps looking toward the institution of any proceedings for the recovery of penalties named in the statute of Georgia to enforce compliance with the order against the express company, as threatened in said order of August 2, 1898, for the reason that the order was null and void, and that the said commission had no jurisdiction to adjudge and designate the party who was to pay said tax.

The Court at the same time filed his opinion, which appears in the record of this case, filed with this application for certiorari, and is also published in 92 Fed. R., 714.

In his opinion, Judge Speer, referring to the attitude of the express company, said:

> "It had declined to test in the courts the question whether the "war stamp tax on its bills of lading and manifests is payable by "the shipper or by itself. This was done because of the enor-"mous penalties—from one thousand to five thousand dollars fine "in each case—with which it was solemnly threatened by the rail-"road commission unless in five days it abandon its contention "that the shipper must pay the tax, accept all shipments and "itself furnish, affix, and cancel the stamps. This is plain from "the resolution of its directors, in which they state that 'it is "'deemed expedient to comply with the orders of the railroad com-"'mission of Georgia in the premises, in order to avoid penalties "'under the laws of Georgia, and so clouding the company's title "'to its corporate franchises and rights as to embarrass its action.'"

And further, referring to the position of the commission, the Judge said:

"We shall presently see that the commission has as little concern "with the construction of the revenue law as the State, which is "not before the Court. It is true the learned attorney-general in "his brief states that the demurrer presents this question: 'Does "'the act of Congress levy the stamp tax upon the shipper or ex-"'press company, or is it a general or floating tax?' Now, if "the attorney-general of Georgia were the attorney-general of "the United States, and was engaged in an effort to enforce the "payment of the United States tax from the Southern Express "Company, his proposition would probably require judicial deter-"mination. The fact, however, that he appears in this case as the "attorney-general of the State betrays how untenable is his position. "This revenue tax is imposed by the United States. It affects all "the people of all the States. It is national in its character, and "'admits and requires uniformity of regulation and enforcement in "'all of the States.' It follows that its distribution, apportion-"ment, collection, and enforcement is not within the administrative "control of the authorities of a particular State. The respective "spheres of action of the State and United States courts, to use "the apposite illustration of Chief Justice Brown, in Hines and "Hobbs vs. Rawson, 40 Ga., p. 356, are each 'as for beyond the "'reach of the other as if the line between them was traced by "'landmarks and monuments visible to the eye.' Indeed, the "action of the railroad commission, as recited in the bill and ad-"mitted by the demurrer, is not only an appropriation of functions "belonging exclusively to officials of the United States charged "with the collection of the tax, but it is an expansion of its own "authority as defined by the law of the State. This is to be found "in section 2217 of the Civil Code of Georgia, and provides that "all express and telegraph companies doing business in whole or "in part in this State 'shall be under the control of the railroad "'commission of Georgia, who shall have full power to regulate "'the prices to be charged * * * for any service performed "'by any such company or persons, etc.' All of the powers of "the commission relative to railroads are extended by this leg-"islation to include telegraph and express companies. Without "quoting the voluminous enactments defining the powers of the "railroad commission, it will be enough to say that, like the section "of the Code quoted above, so far as they are germane to this con-"troversy they relate to the fixation of rates or prices for trans-"portation or conveyance. In so far as they are penal in effect, "under the familiar rule they must, of course, be strictly construed. "Bearing in mind this cardinal canon of construction with regard "to penal legislation, how unprecedented seems that latitudinous "interpretation which would make *the punishment fixed by the "statute apply to the failure of a corporation to pay a disputed stamp "tax imposed by the United States* upon a written evidence of ship-"ment, required by the United States. *The revenue exaction is no "part of a rate for the shipment of express matter.* It is no part

"of the price for 'a service rendered' the shipper. It is a tax "for national purposes, and its payment or collection is in no "sense directly or indirectly within the sphere 'of a State admin- "'istrative board.' Like the tax on distilled spirits, this is an in- "ternal revenue tax. Should the express company ship a package "of any character in the absence of this stamp on a bill of lading, "it would incur a penalty of $50. If it should accept and know- "ingly 'remove' or ship a package of distilled spirits, unless it "also bore the stamp required by the law, it would be guilty of "an infamous offense, and its officers punished by imprisonment "in the penitentiary. Now, has the railroad commission control "over the shipment of an unstamped cask of liquor? Has it "authority to direct that the express company and not the distiller "shall pay for and attach the stamp? Has it any authority to "threaten the imposition of its crushing penalties on the express "company, and thus compel it to remove the liquor before the "distiller has attached the stamp, which is the evidence that the "tax thereon has been paid. This will scarcely be maintained. "But in either case the duty of the express company must of "necessity be determined by the construction of the United States "law. * * * Upon this preliminary hearing the decision will "therefore be confined to matters distinctly in issue. The prayer "for temporary injunction against the express company will be "denied, and the railroad commission will be enjoined conformably "to the prayers of the bill."

14. The railroad commission, being dissatisfied with the judgment of said Court granting said injunction against them, entered an appeal to the Circuit Court of Appeals for the fifth circuit on March 18, 1899, on the grounds that the Court erred in not sustaining the demurrer upon each ground, and in granting the injunction against them as set out therein; that the Court erred in holding the order of August 2, 1898, null and void; and that the Court erred in holding that defendants did not have competent authority for the institution and prosecution of the suits threatened in said order; that the Court also erred in holding that the action of the express company in compelling the consignor to pay the charges which had been imposed by the war revenue act of 1898 did not amount to an increase of rates as prescribed by the railroad commission; and further, the Court, having taken jurisdiction to prevent a multiplicity of suits respecting the subject matter, erred in not determining whether the express company or the consignor was liable to pay said tax and erred in granting the injunction without determining such matters.

15. That thereupon your petitioners, complainants in said bill, as the said commission had appealed on the ground that the Court erred in holding that the action of the express company in compelling the consignor to pay a charge fixed by the war revenue act did not amount to an increase in rates, also sued out their cross bill March 28, 1899, alleg-

ing that the Court erred in denying the injunction against the express company, as prayed for, and in not enjoining said company from complying voluntarily with the order of the commission of August 2, 1898 and also in refusing to enjoin the express company from paying the war revenue stamp approved June 13, 1898. The Court having held—that as against the express company—its duty

"must of necessity be determined by the construction of the United "States law."

16. That thereafter, on May 16, 1900, said case came up for hearing in the Circuit Court of Appeals for the fifth district, in New Orleans, La., when, after argument had, the Court reserved its decision until June 1st, at or about the time of its final adjournment, when the Court, through a majority of the judges, Messrs. McCormick and Pardee, delivered an opinion sustaining the said action of the railroad commission and ordering—

"that the decree of the Circuit Court be and the same is hereby "reversed, and that the suit be and is hereby dismissed, at the cost "of the complainant."

In the opinion the Court stated:

"It is true, but wholly immaterial, that the commissioners held "and expressed the view that the war revenue act imposed the tax "in question exclusively upon the carrier, and *precludes* it from "relieving itself of the expense of affixing and cancelling the stamp "required to be attached to each bill of lading, manifest, or other "evidence of receipt by passing that expense to the shipper and "requiring him to submit to *an increased rate to that extent.* This "construction is unsound, but, as we have just said, is wholly immaterial, for the act of Congress neither prohibits or authorizes such "increase of rates. Neither expressly or by implication does it "contain any provision on that subject."

Having thus construed the law as contended by petitioners, the Court went on and held that the express company was bound by the said orders of the commission, and that there was nothing in the bill to show—

"that the tariffs of rates and classification and the rules prescribed "by the commission, and now sought to be enforced by it, do not "observe the limitations of the Constitution of the United States," and that there was "no statement whatever of the amount of the "income of the company from its Georgia business (intrastate busi-"nesss) or from its other business (interstate business), nor from "both together—either their gross income or net income or profits "of the company,"

and this notwithstanding that it appeared from the allegations of the bill (paragraph 11) that it cost the express company 95½ per cent. of its gross receipts to do business in the State of Georgia, to wit: 50 per cent. of its gross receipts to the railroad companies for carriage; 43 per cent. for expenses, and 2½ per cent. for State taxes, making 95½ per cent., leaving only 4½ per cent. as a net income on receipts in Georgia, and

which would be further reduced by $42,000 a year in the State of Georgia alone if the cost of the stamp were required to be paid by the company, which result would compel the company to do business at too low a rate, lower than the rates fixed by the commissioners before the passage of the law which rates were established—

"so as to enable the company to live, operate, and pay a fair divi-
"dend or return to the owners for the money and property embarked
"in said business,"

while the order of said commission would cause a large reduction of the income, and the enforcement of the order would be unfair, unjust, and unreasonable; that the rates of carriage thereby imposed required the company to carry many classes of freight barely at cost, and the expense in future would be increased by the stamp, and that the payment for said stamps thus required to be made a part of the rates imposed on the express company under which it must do business, by the order of the said commission,

"would result in irreparable damage and injury, and would cause
"a diminution of income, as nearly as can be ascertained, of $40,000
"per annum, and a loss to complainants in the decreased value of
"their shares of $10,000 or other large sum."

The demurrer of the commissioners admitted these allegations to be true, yet the Court sustained the order of the commission designating that the company was to pay the stamp duty and held that no case was made "to restrain the action of the railroad commission of Georgia."

Speaking of rates the Court said:

"the increase which the carrier proposes to make by adding the
"tax imposed by the war revenue Act does manifestly discriminate,
"largely and unjustly, between the shipper of a small package for
"a short distance at a low rate, and the shipper of a larger pack-
"age the longer distance at the larger rate. Though each shipper
"is charged one cent, the relation of this charge to the service is
"unequal."

That to this decision Circuit Judge Shelby filed his dissent June 16, 1900, and stated that, in his opinion, Judge Speer's decision was correct and should be affirmed and, after reviewing the case somewhat, said—

"The commission on August 2, 1898, *ordered and directed the said*
"*stamp tax to be furnished, attached, cancelled, and paid by the said*
"*Southern Express Company alone, and not by the shippers, in whole*
"*or in part.*

"The purport and effect of the order is to so construe the act of
"Congress of July 13, 1898, as to make it incumbent on the express
"company to pay the tax therein prescribed, and to hold that the
"express company cannot cast the burden of the tax on the shipper
"without making the rates unreasonable and exceeding the rate of
"charges previously fixed by the railroad commission.

"In the case of the *American Express Company* v. *Maynard,*
"*Attorney-General of the State of Michigan*, decided April 16, 1900,
"the Supreme Court holds that there is nothing in the act of Con-

"gress levying the tax that prevents the express company from "adding the tax to the charges made by it.

"The order was unquestionably made by the railroad commission "on the theory that the act of Congress required the Southern "Express Company to pay the tax, and that it forbade the com- "pany to shift the burden to the shipper. The Supreme Court, in "the case cited, has not construed the act of Congress on the ques- "tion as to who is required to pay the tax, but it has decided that, "conceding that the act required the express company to pay it, "there is nothing in the act to prevent the company from casting "the burden of the tax on the shipper. The rates charged by the "express company were prescribed as reasonable by the railroad "commission of Georgia. The complaint in the order of July 11, "1898, is that the express company has required the shippers to "pay the special tax, 'thus indirectly increasing the cost of trans- "'portation beyond the rate therefor fixed by the commission.' "The authority conferred on the railroad commission is to fix rea- "sonable rates. The order of the commission can not be justified "on the theory that the charges of the express company, with the "taxes added, are unreasonable. If the rate which the commission "has fixed was reasonable, it certainly does not make it unreasona- "ble to add to it the increased cost of transportation, caused by the "act of Congress. As the commission fixed the rate, the order "complained of must have been made on the assumption that the "act of Congress places the tax on the express company and "deprives it of the right to shift the burden by contract.

"In the *American Express Company* v. *Maynard*, *supra*, the "Supreme Court said: 'As there was no allegation that the rates "'existing prior to the imposition of the one cent stamp tax were "'unreasonable, it would follow that the rates which were other- "'wise reasonable were decided not to be so solely because there "'was added to the charge for each package the exact amount of "'the increased cost for transporting the package, occasioned as to "'each package by the specific imposition on each by the act of "'Congress of the one cent stamp tax. But to cause rates which "'were conceded to be reasonable to become unreasonable, because "'alone of such increased charge, the assumption must be made "'that the act of Congress not only imposed the burden of the tax "'solely on the express company, but also forbade its shifting the "'same by any and every method.'

"The order of the railroad commission prescribes *who shall pay "the tax and who shall not pay it*, and in effect prevents any contract "between the shipper and the carrier in reference to the payment "of the tax. This order is evidently based on an erroneous con- "struction of the act of Congress. It is assumed by the commission "that the act required the express company to pay the tax, and "forbids the express company from making any agreement which "shifts the burden upon the shipper. * * *

"The order made by the commission and enjoined by the Circuit "Court can not be held to be one fixing reasonable rates to be "charged by the express company. The commission had already "performed that duty. If, in view of the changed conditions, the "commission had made a new schedule of charges, and in doing so "had not exceeded its authority, there would be no cause of com- "plaint. But the order can not be treated as one fixing a new "schedule of charges. The one formerly fixed remains unchanged, "and the present order in effect says to the express company: 'You "'shall not require the shipper of packages to pay the one cent "'tax; you shall not contract with him to secure its payment by "'him; you shall furnish, attach, and cancel the stamp; the ship- "'per shall not do it in whole or in part.' The order is one forbid- "ding certain contracts prior to the shipment of the goods by the "express company. The express company is to be subjected to the "suits and penalties, *not for violating any new schedule prescribed, "but for the making of contracts which shift the burden of the tax.* "The railroad commission seeks to accomplish by its order what "was done by the writ of mandamus by the State courts in Michi- "gan. But the Supreme Court, in reversing the decree of the "Supreme Court of Michigan, has, it seems to me, established a "construction of the act of Congress in direct conflict with the "theory on which the railroad commission of Georgia acted. *Ameri- "can Express Company* v. *Maynard, supra.*

"I think the Circuit Court was right in holding that the 'rail- "'road commission had no jurisdiction to adjudge and designate the "'party who shall pay the tax.' The order made by the commis- "sion requires 'the stamp tax to be furnished, attached, cancelled, "'and paid for by the Southern Express Company alone, and not "'by the shippers in whole or in part.' In effect, the command is "that the express company shall pay it and that the shipper shall "pay no part of it, and that the shipper and the carrier shall not be "permitted to make any contract for its payment, in whole or in "part, by the shipper.

"I concur in the views expressed by the Court that the State has "power to prescribe the charges of public carriers for the carriage "within the State of persons and merchandise. The power is, of "course, subject to the limitation that the carriage can not be re- "quired without reward or upon conditions amounting to the taking "of property for public use without just compensation. I do not "deny or question the right of the State to tax, control, or regu- "late, subject to constitutional limitations, any business carried on "by corporations or individuals within its limits. Conceding all "this, *where does the commission get the right* to say who shall and "who shall not pay a federal tax? It is the theory of our system "of government that the State and the nation alike are to exercise "their powers respectively, each without hindrance from the other. "This theory, by necessary implication, excludes wholly any inter- "ference by either with the independent exercise by the other of

"its constitutional powers. Cooley on Taxation (2d ed.), 83:
"'The State tribunals must, in proper cases, construe federal laws,
"'subject to the final decision of the Supreme Court, but neither
"'the Legislature of a State, nor a commission created by it, has
"'authority to make laws or orders directing who shall or who
"'shall not pay a tax constitutionally levied by the United States.'
"Surely such orders can not be valid in cases where they would
"tend to embarrass the government in the collection of the tax.
"The order in question does not purport to be one regulating the
"charges to be made by the express company. It is in terms one
"laying down a rule as to who shall and who shall not pay a stamp
"tax to the United States. It is applicable to all packages, whether
"or not the stamp, if treated as an additional charge, makes the
"whole charge exceed the rates previously fixed by the commis-
"sion. The order, it seems to me, not only embodies an erroneous
"construction of the revenue law, but its enforcement may materi-
"ally interfere with the collection of the tax. The question of the
"taxing powers of the States, as their exercise has affected the
"functions of the federal government, has been often considered
"by the Supreme Court, and the right of the States to impede or
"embarrass the constitutional operations of the general government
"or the rights of its citizens by levying taxes has been denied.
"*Crandall* v. *State of Nevada*, 6 Wall., 33. If the States can inter-
"fere by prescribing regulations as to the collection of the revenues
"of the Federal Government, and can say who shall and who shall
"not pay a prescribed tax, *and forbid contracts* between citizens in
"reference to it which are permissible under the statute creating
"the tax, then the States have the right and power to embarrass
"and impede at a vital point the operations of the general govern-
"ment. The same policy and law which forbids the States to tax
"the instrumentalities of the Federal Government should deprive
"them of the power to embarrass, prevent, or regulate the collection
"of revenues collected under its constitutional powers.

"The Supreme Court has said on two occasions, Chief Justice
"Marshall delivering the opinions, that 'the States have no power
"'by taxation, or otherwise, to retard, impede, burden, or in any
"'manner control the operation of the constitutional laws enacted
"'by Congress to carry into execution the powers vested in the gen-
"'eral government.' *McCulloch* v. *The State of Maryland*, 4
"Wheat., 316; *Weston* v. *The City Council of Charleston*, 2 Pet., 449.

"Is it not clear that the order of the railroad commission seeks
"'to control the operation' of the law enacted by Congress? It
"pointedly says who shall and who shall not pay the tax levied by
"the Act. It forbids lawful contracts on the subject. It impedes
"the collection of the tax by saying that it shall not be paid by
"certain persons who otherwise might pay it.

"If the state can create a commission to make the order in
"question, has it not equal authority to regulate by statutes and
"commissions the attaching, cancelling and furnishing of the

"stamps on checks, conveyances, leases, and other instruments;
"and on patent medicines, matches and other articles taken by the
"statute? If the administration of the United States revenue
"laws is subject to state supervision, is there any reason why the
"post offices within the state and the stamps there used should
"escape the same jurisdiction? and accordingly incident that there
"was equity in the bill and that it should not have been dismissed."

17. That your petitioners show that they are dissatisfied with the said judgment of a majority of the judges of the said Circuit Court of Appeals. That the decision in question went beyond the matters considered by the Circuit Court, that Court having granted but a temporary injunction against the Commission, and had not disposed of the demurrers filed by the said Commission, nor had there been any answer or other pleading from the Southern Express Company, but that under the Act creating said Circuit Court of Appeals said decision against petitioners is as to said Commissioners made final in their favor.

18. That your petitioners are advised and believe that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for review and determination, under and in conformity with the provisions of the 6th section of the Act of Congress entitled

"An Act to establish Circuit Courts of Appeals, to define and reg-
"ulate in certain cases the jurisdiction of the Courts of the United
"States and for other purposes,"

approved March 3, 1891,—petitioners presenting this their petition for certiorari within one year from the rendition of the judgment of the said Circuit Court of Appeals and at the first term of this Court thereafter; accompanying the same with a certified copy of the entire record of said case in the Circuit Court of Appeals as required by rule 37 of this Honorable Court, said record being filed herewith as part of this application for certiorari.

19. That the questions involved in said suit are of gravity and important to the nation at large:

First. In having defined the power, if any, and the limits of the power, that State Administrative Boards have to determine who shall or who shall not pay a stamp duty lawfully imposed by the Congress of the United States, when under the Constitution the power was given Congress "to lay and collect" taxes, &c., said Circuit Court of Appeals having in effect held that the Georgia Railroad Commission had the power to determine who shall pay said stamp duty and to enforce the collection thereof by state statutory penalty suits.

Second. To the shipping public and the express companies throughout the United States, as to who is required by the said Act of Congress to pay the stamp duty on packages transported by express within the sev-

eral states comprising the United States, said Circuit Court of Appeals having confirmed an order that the express company only was required to pay.

Third. In having adjudicated, whether or not an excise duty, lawfully imposed by the Congress of the Unlted States, under the constitutional provision that all such "shall be uniform throughout the United States," can be held, in a case where a one-cent stamp on an express receipt is required by the company to be attached by the shipper,—

> "to manifectly discriminate, largely and unjustly, between the "shipper of a small package for a short distance at a low rate, and "the shipper of a larger package for a longer distance at a larger "rate."

That these matters affect the internal regulations of the country at large; the former, the relations between the general government and officers of the states: and petitioners charge that the decision of the said Circuit Court of Appeals as to the first question, is in conflict with the fundamental principles underlying the decisions of this Court in *McCullough* v. *The State of Maryland*, 4 Wheat., 316; *Weston* v. *City Council of Charleston*, 2 Pet., 449; *Crandall* v. *Nevada*, 6 Wall., 46, *Boske* v. *Comingore*, 177 U. S, 559, and *Knowlton* v. *Moore*, decided May 14, 1900.

And, as to the second and third questions, said decision conflicts with the plain intent of the said act of Congress itself, and with the cases of *Hubbell* v. *Crawford* and *American Express Co.* v. *Michigan*, decided April 16th, 1900, 177 U. S., 404, wherein this Court held, that conceding for the sake of argument that the stamp tax in question was imposed by Congress upon the express company, still the company had a right to pass the tax on to the shipper, and further that if reasonable rates existed at the time the stamp act was passed, they were not rendered unreasonable by adding thereto the stamp duty imposed thereby; and with the case of *Knowlton* v. *Moore*, decided May 14, 1900, wherein this Court construed the uniformity clause of the constitution relating to the progressive rate feature of the War Revenue act aforesaid.

20. That petitioners therefore respectfully submit, that the question of the legal and just construction of the said Act of Congress of June 13th, 1898, so far as it relates to the payment of stamps on express receipts, and who is finally bound to pay the same, and whether said Act of Congress makes this payment a part of the rate of carriage to be paid by the express company on local business in Georgia, as was determined by the Railroad Commission of Georgia, which Commission and said decision of the Circuit Court of Appeals denied to said company the right to contract with shippers for the payment of said stamp tax,—should be finally and authoritatively adjudged by this Court, if it has not already done so as petitioners contend, by the cases aforesaid.

21. Your petitioners therefore insist that the judgment rendered by the Circuit Court of Appeals of the Fifth District, is erroneous, and should be reversed for the following reasons:

1. Because it confirms an illegal order of the State Railroad Commission, a body created to regulate freight and passenger tariffs, which order expressly designates *who shall or who shall not pay the* constitutional stamp duty or tax levied by the Act of Congress, and further orders said tax to be paid in a manner contrary to the said act of Congress, when under the Constitution creating the Federal Government, neither the states, nor such a commission created by and existing under their laws, have the right or power so to designate as to who shall or shall not pay taxes levied and due to the General Government.

2. Because the Circuit Court of Appeals having determined—

> "that the issue between the Railroad Commission of Georgia and "the Southern Express Company was: Had that company the "right to add to the maximum charges prescribed by the Commis- "sion the cost of the one cent revenue stamp required by the Act "of Congress to be attached to a receipt issued in each case of "shipment;"

and that:

> "As the Act of Congress in question does not purport to fix or af- "fect the rates which carriers may charge for transportation,"

erred, when it held that the Railroad Commission of Georgia, a State administrative Board, had the power under the laws of Georgia to provide for the collection of and define who was to pay for the said Internal Revenue stamp or duty, laid by the Federal government on each shipment by express within the State of Georgia, had held that the express company should pay, and that the company could not contract with the shipper for its payment.

3. Because said Court also erred when it thus enlarged and extended the powers of said Commission, and reversed the Circuit Court, which had correctly held, 92 F. R., 715, that:

> "The question whether the war stamp tax imposed by the United "States upon the manifests and bills of lading of express com- "panies, shall be borne by the company or by shippers, *is not one* "*within the control* of the administrative officers of a particular "state, and an order of a State Railroad Commission requiring its "payment by the express companies is without jurisdiction and "void;"

and—

> "The statute of Georgia giving the Railroad Commission the "power to fix rates for transportation to be charged by express "companies, and imposing penalties for violation of their orders, "*cannot be extended by a construction* to include authority to order "an express company to pay the war stamp tax imposed by the

"United States without demanding its payment from shippers,
"subject to the same penalties for its violation, such tax having
"no relation to the charge for transportation."

4. Because the Circuit Court of Appeals, after having correctly construed the Act of Congress, as aforesaid, i. e., that it

"does not purport to fix or affect the rates which carriers might
"charge for transportation * * for the act of Congress
"neither prohibits nor authorizes such an increase of rates; neither
"expressly nor by implication does it contain any provision on
"that subject,"

nevertheless erred when it affirmed the action of said Railroad Commission, whereby said one-cent stamp or duty laid by the United States government on each shipment, was by said commission made a part of *the rate of carriage* for the express company in the state of Georgia; which act of the commission was held binding on the company, and that any effort made by the company to contract with or have the shipper pay said stamp would be an illegal increase of the rates of carriage fixed by the commission, and subject the company to heavy penalties. The error of the Court being :

(*a*). In affirming and making binding on the company the said ruling that this stamp duty was *a part of the rate of carriage*, when it had just decided the contrary, by holding that said Act of Congress did not "contain any provision" on the subject of rates; and particularly so when it affirmatively appeared that the rates of carriage fixed by the commission were the same now as they had been, before the passage of the said Revenue Law by Congress; and

(*b*) When it affirmatively appeared that the express company did not receive any part of this one-cent duty thus paid to the government; and

(*c*) That under the rates fixed by the Railroad Commission, said company was entitled to receive, say 25 cents for the carriage of a package from Augusta to Atlanta; but, that under the ruling of the Commission, and said Circuit Court of Appeals requiring the company to pay for said stamp, it would only receive 24 cents for the transportation of such a package—the extra cent being paid the government, and not received by the company—and thus, to the extent of one cent per package, the company was unjustly deprived of its property, and required to serve the public at too low a rate; and

(*d*) Because the Court of Appeals in effect held that, notwithstanding the decisions of this Court to the contrary, in the *Hubbell* and *Maynard* cases, *supra*, still the Southern Express Company could not contract with the shipper to pay for said stamp, when, both under the laws of Georgia and said act of Congress, it had the legal right to make such contract for carriage.

5. Because the Court erred when it held—

"That the increase which the carrier proposes to make, by adding

"the tax imposed by the war revenue act, does manifestly discrimi-
"nate, largely and unjustly, between the shipper of a small package
"for a short distance at a low price and a shipper of a larger
"package for the longer distance at the lower rate. Though each
"shipper is charged one cent, the relations of this charge to the
"service is unequal;"

the error of the Court being that it failed to discriminate between what was a rate of carriage for a given service, and what was a tax or excise duty imposed by the United States government upon a transaction called into existence by the voluntary act of a shipper, such tax or duty being by the federal Constitution required to be uniform throughout the United States; petitioners insisting, that, under the war revenue law, no duty is laid nor tax required to be paid, unless the sender of a package desires to make use of the transpartation facilities afforded by an express company, and that the Court erred in denying to said express company the right to contract with said shipper for the payment of this tax on the shipment, and in holding that this was an increase in rates, was unjust, and would discriminate between shippers as stated.

6. Because the Court erred when it held that the rates of the commission were not unreasonable and not too low when it required the express company to pay the stamp tax from the income it received from the maximum rates fixed by said commission, in addition to the other burdens put upon the company by law, petitioners contending that if such ruling is legal, the rates prescribed for the company are too low, and require it to serve the public, if not at a loss, at too low a sum for the property invested.

7. Because the Court erred when it held that there were no sufficient facts alleged in the bill to show that the rate prescribed by the Railroad Commissioners was unreasonable, it appearing from the allegations of the bill, paragraph 11, that the charges on the gross income of the express company were: 50 per cent to the railroad company for carriage; 45 per cent. for expenses, 2½ per cent. in taxes, a total of 95½ per cent., leaving a net income from the property invested of one 4½ per cent, which in itself would be materially reduced by the requirement of paying the stamp tax, which in the State of Georgia alone would amount to $42,000 on local business, and that if the order of the commission was enforced, the rates would be too low, and result in irreparable loss and damage to the company, and such rates would be unfair, unjust and unreasonable. Further, the Court erred in dismissing the bill for not avering what was its income from its *inter-state* business, when this business was not involved in the suit.

8. Because the Court erred when it ordered the bill dismissed, when there was no special demurrer pointing out the defects suggested by the Court in the bill, petitioners insisting that they should have had an opportunity to amend to meet these defects of which they had no notice,

the same having never been suggested in the Court below nor in Court of Appeals, but originated with the Court of Appeals itself.

9. Because the Court rendered a final decree June 1, 1900, dismissing the bill against all defendants.

WHEREFORE petitioners respectfully pray that a Writ of Certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record, and all proceedings of the said Circuit Court of Appeals in said case therein, entitled The Railroad Commission of Georgia, Appellants, vs. W. B. Dinsmore, et al., Respondents, No. 820, to the end that the said case may be reviewed and determined by this Court, as provided by section 6 of the Act of Congress entitled—

"An Act to establish Circuit Court of Appeals and to define and "regulate in certain cases the jurisdiction of the Courts of the "United States, and for other purposes,"

approved March 3, 1891, or that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity to the said Act, and that the judgment of said Circuit Court of Appeals in said case and every part thereof, may be reversed by this Honorable Court.

And petitioners will ever pray.

WM. B. DINSMORE, et al,
By
FRANK H. MILLER, their Solicitor.

UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF GEORGIA, NORTHEASTERN DIVISION.

Frank H. Miller, being duly sworn, says he is the original counsel for the petitioners above named, and as such had personal charge of the case in the foregoing petition mentioned in the Circuit Court of the United States for the northeastern division of the Southern district of Georgia, and also in the United States Circuit Court of Appeals, where the cause, owing to his sickness, was argued by his son, William K. Miller, Esq., on the last hearing, May 16, 1900; that he has read said petition, to which his name is subscribed as counsel, and that the facts therein stated are true to the best of his information and belief.

Sworn to and subscribed before me this 10th day of August, 1900.

FRANK H. MILLER.

W. C. WARDLAW, *Notary Public, R. C., Ga.*

I hereby certify that I have examined the foregoing petition and that, in my opinion, the same is well founded; that the cause is one in which the prayer of the petitioners should be granted by the Court.

FRANK H. MILLER, *Solicitor for Petitioners.*

August 10th, 1900.